Civil Procedure

Cases, Text, Notes, and Problems

Third Edition

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Chapter 1

Introduction to Civil Procedure and Practice

Section D. The Adversary System

Insert at page 12, after the end of the second paragraph:

Consistent with this discussion of the responsibility of lawyers in the litigation process, an amendment to Rule 1 of the Federal Rules of Civil Procedure was recommended by the Advisory Committee on Civil Rules and approved by the Standing Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court. This rule amendment took effect on December 1, 2015. (For a further discussion of the process of amending the federal rules, see pages 20-21 in the Casebook.)

Rule 1. Scope and Purpose

* * * [These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

As explained by the Advisory Committee,

> Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.

* * * * *

Chapter 2

Personal Jurisdiction and Related Matters

Section B. The "Minimum Contacts" Test

4. In Rem and Quasi in Rem Jurisdiction After *International Shoe*

Insert the following new note in the *Notes and Questions* at page 107:

8. The Delaware Supreme Court has upheld the validity of the Delaware "consent statute" on several occasions in actions brought against nonresident directors or officers for claims arising out of a breach of that director's or officer's duty to the corporation. The specific terms of the Delaware consent statute also assert personal jurisdiction over nonresident officers when actions are brought by, on behalf of, or against a Delaware corporation when "such officer is a necessary or proper party" in the action.

An early Delaware Chancery decision had essentially read the necessary-or-proper-party provision out of the consent statute on the fear that it could be susceptible to an overbroad reach that could endanger the constitutionality of the statute. In *Hazout v. Tsang Mun Ting*, 134 A.3d 274 (Del. 2016), the Delaware Supreme Court made clear that the necessary-or-proper-party provision is applicable and may be used in appropriate circumstances. In *Hazout*, the Delaware Supreme Court did acknowledge that while "one can conceive of cases where applying the [statute's] plain terms might compromise a nonresident fiduciary's due process rights, it is equally easy to conceive of cases . . . where Delaware's exercise of personal jurisdiction under the Necessary or Proper Party Provision would pose no constitutional difficulty." According to the court, the proper method to "police" improper applications is "to use the minimum contacts analysis required by *International Shoe* to ensure that the statute is not used in a situationally inappropriate manner."

In *Hazout*, the nonresident (Canadian) officer (here the President/CEO) of a Delaware corporation operating in Canada was not being sued for having breached any duty the officer owed the corporation. Instead, the officer was being sued for torts the officer allegedly committed against others in the course of negotiating a "change of control" agreement on behalf of the corporation and by using the officer's powers to divert funds to the officer's affiliate from the investors who were providing the corporation with a "capital infusion." (In a more humorous note, after a different director refused to sign the "change of control" agreement, the President/CEO and the corporation "did not send back the [investors'] money. Rather, on April Fools' Day 2014, they told [the investors] that the corporation had already spent a quarter of the million dollars to pay off debts, and they weren't joking." By three days later, the rest of the money had been transferred elsewhere as well.) The unhappy investors sued in Delaware.

The court also recognized that the officer was not a "necessary" to the case against the corporation because the Delaware Superior Court could have proceeded to a final determination of the action with the corporation alone. On the other hand, the officer was "obviously a proper party because he [had] a tangible legal interest in the matter that [was] separate from the corporation's interest and because the claims against [the officer arose] out of the same facts and occurrences as the claims against the corporation—alleged wrongs that [the officer] committed in [the officer's] capacity as the company's President and CEO."

Having made this determination, the Delaware Supreme Court then examined whether, in this particular instance, exercising personal jurisdiction over the officer would be consistent with the officer's "constitutional expectations of due process." Particularly important was the fact that becoming an officer and director of a Delaware corporation allowed him to avail himself of protections under Delaware law, the very terms the officer was negotiating involved the change of control of a Delaware public corporation, and the negotiated agreement made Delaware law applicable.

Section C. The Concepts of Specific and General Jurisdiction

1. Specific Jurisdiction

Insert at page 152 after Note 7 and before the *Problems* on that page:

Walden v. Fiore
United States Supreme Court, 2014
571 U.S. __, 134 S. Ct. 1115, 188 L. Ed. 2d 12

JUSTICE THOMAS delivered the opinion of the Court.

. . . .

I

Petitioner Anthony Walden serves as a police officer for the city of Covington, Georgia. In August 2006, petitioner was working at the Atlanta Hartsfield-Jackson Airport as a deputized agent of the Drug Enforcement Administration (DEA). As part of a task force, petitioner conducted investigative stops and other law enforcement functions in support of the DEA's airport drug interdiction program.

On August 8, 2006, Transportation Security Administration agents searched respondents Gina Fiore and Keith Gipson and their carry-on bags at the San Juan airport in Puerto Rico. They found almost $97,000 in cash. Fiore explained to DEA agents in San Juan that she and Gipson had been gambling at a casino known as the El San Juan, and that they had residences in both California and Nevada (though they provided only California identification). After respondents were cleared for departure, a law enforcement official at the San Juan airport

notified petitioner's task force in Atlanta that respondents had boarded a plane for Atlanta, where they planned to catch a connecting flight to Las Vegas, Nevada.

When respondents arrived in Atlanta, petitioner and another DEA agent approached them at the departure gate for their flight to Las Vegas. In response to petitioner's questioning, Fiore explained that she and Gipson were professional gamblers. Respondents maintained that the cash they were carrying was their gambling "'bank'" and winnings. . . . After using a drug-sniffing dog to perform a sniff test, petitioner seized the cash.[1] Petitioner advised respondents that their funds would be returned if they later proved a legitimate source for the cash. Respondents then boarded their plane.

After respondents departed, petitioner moved the cash to a secure location and the matter was forwarded to DEA headquarters. The next day, petitioner received a phone call from respondents' attorney in Nevada seeking return of the funds. On two occasions over the next month, petitioner also received documentation from the attorney regarding the legitimacy of the funds.

At some point after petitioner seized the cash, he helped draft an affidavit to show probable cause for forfeiture of the funds and forwarded that affidavit to a United States Attorney's Office in Georgia.[2] According to respondents, the affidavit was false and misleading because petitioner misrepresented the encounter at the airport and omitted exculpatory information regarding the lack of drug evidence and the legitimate source of the funds. In the end, no forfeiture complaint was filed, and the DEA returned the funds to respondents in March 2007.

Respondents filed suit against petitioner in the United States District Court for the District of Nevada, seeking money damages under *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971). Respondents alleged that petitioner violated their Fourth Amendment rights by (1) seizing the cash without probable cause; (2) keeping the money after concluding it did not come from drug-related activity; (3) drafting and forwarding a probable cause affidavit to support a forfeiture action while knowing the affidavit contained false statements; (4) willfully seeking forfeiture while withholding exculpatory information; and (5) withholding that exculpatory information from the United States Attorney's Office.

The District Court granted petitioner's motion to dismiss. Relying on this Court's decision in *Calder v. Jones,* 465 U.S. 783 (1984), the court determined that petitioner's search of respondents and his seizure of the cash in Georgia did not establish a basis to exercise personal jurisdiction in Nevada. The court concluded that even if petitioner caused harm to respondents in Nevada while knowing they lived in Nevada, that fact alone did not confer jurisdiction. Because the court dismissed the complaint for lack of personal jurisdiction, it did not determine whether venue was proper.

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[1] Respondents allege that the sniff test was "at best, inconclusive," and there is no indication in the pleadings that drugs or drug residue were ever found on or with the cash. . . .

[2] The alleged affidavit is not in the record. Because this case comes to us at the motion-to-dismiss stage, we take respondents' factual allegations as true, including their allegations regarding the existence and content of the affidavit.

On appeal, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed. The Court of Appeals assumed the District Court had correctly determined that petitioner's search and seizure in Georgia could not support exercise of jurisdiction in Nevada. The court held, however, that the District Court could properly exercise jurisdiction over "the false probable cause affidavit aspect of the case." 688 F.3d 558, 577 (2011). According to the Court of Appeals, petitioner "expressly aimed" his submission of the allegedly false affidavit at Nevada by submitting the affidavit with knowledge that it would affect persons with a "significant connection" to Nevada. [3] *Id.* at 581. After determining that the delay in returning the funds to respondents caused them "foreseeable harm" in Nevada and that the exercise of personal jurisdiction over petitioner was otherwise reasonable, the court found the District Court's exercise of personal jurisdiction to be proper. *Id.* at 582, 585. The Ninth Circuit denied rehearing en banc . . . . *Id.* at 562, 568.

We granted certiorari to decide whether due process permits a Nevada court to exercise jurisdiction over petitioner. . . . We hold that it does not and therefore reverse. [5]

II A

"Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG v. Bauman,* 571 U.S. __ (2014). This is because a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process on a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Here, Nevada has authorized its courts to exercise jurisdiction over persons "on any basis not inconsistent with . . . the Constitution of the United States." Nev. Rev. Stat. § 14.065 (2011). Thus, in order to determine whether the Federal District Court in this case was authorized to exercise jurisdiction over petitioner, we ask whether the exercise of jurisdiction "comports with the limits imposed by federal due process" on the State of Nevada. . . .

B 1

The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980). Although a nonresident's physical presence within the territorial jurisdiction of the court is not required, the nonresident generally must have "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)).

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[3] The allegations in the complaint suggested to the Court of Appeals that petitioner "definitely knew, at some point *after* the seizure but *before* providing the alleged false probable cause affidavit, that [respondents] had a significant connection to Nevada." 688 F.3d at 578.

[5] We also granted certiorari on the question whether Nevada is a proper venue for the suit under 28 U.S.C. § 1391(b)(2). Because we resolve the case on jurisdictional grounds, we do not decide whether venue was proper in Nevada.

This case addresses the "minimum contacts" necessary to create specific jurisdiction. The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant "focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 775 (1984) (quoting *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977)). For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State. Two related aspects of this necessary relationship are relevant in this case.

First, the relationship must arise out of contacts that the "defendant *himself*" creates with the forum State. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985). Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties. *See World-Wide Volkswagen Corp.,* 444 U.S. at 291-92. We have consistently rejected attempts to satisfy the defendant-focused "minimum contacts" inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 417 (1984) ("[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction"). We have thus rejected a plaintiff's argument that a Florida court could exercise personal jurisdiction over a trustee in Delaware based solely on the contacts of the trust's settlor, who was domiciled in Florida and had executed powers of appointment there. *Hanson v. Denckla,* 357 U.S. 235, 253-54 (1958). We have likewise held that Oklahoma courts could not exercise personal jurisdiction over an automobile distributor that supplies New York, New Jersey, and Connecticut dealers based only on an automobile purchaser's act of driving it on Oklahoma highways. *World-Wide Volkswagen Corp.,* 444 U.S. at 298. Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be "decisive in determining whether the defendant's due process rights are violated." *Rush,* 444 U.S. at 332.

Second, our "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there. *See, e.g., International Shoe,* 326 U.S. at 319 (Due process "does not contemplate that a state may make binding a judgment *in personam* against an individual . . . with which the state has no contacts, ties, or relations"); *Hanson,* 357 U.S. at 251 ("However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him"). Accordingly, we have upheld the assertion of jurisdiction over defendants who have purposefully "reach[ed] out beyond" their State and into another by, for example, entering a contractual relationship that "envisioned continuing and wide-reaching contacts" in the forum State, *Burger King,* 471 U.S. at 479-80, or by circulating magazines to "deliberately exploi[t]" a market in the forum State, *Keeton,* 465 U.S. at 781. And although physical presence in the forum is not a prerequisite to jurisdiction, *Burger King,* 471 U.S. at 476, physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact. *See, e.g., Keeton,* 465 U.S. at 773-74.

But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him. *See Burger King,* 471 U.S. at 478 ("If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot"); *Kulko v. Superior Court,* 436 U.S. 84, 93 (1978) (declining to "find personal jurisdiction in a State . . . merely because [the plaintiff in a child support action] was residing there"). To be sure, a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction. *See Rush,*444 U.S. at 332 ("Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe,* however, must be met as to each defendant over whom a state court exercises jurisdiction"). Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the "random, fortuitous, or attenuated" contacts he makes by interacting with other persons affiliated with the State. *Burger King,* 471 U.S. at 475 (internal quotation marks omitted).

2

These same principles apply when intentional torts are involved. In that context, it is likewise insufficient to rely on a defendant's "random, fortuitous, or attenuated contacts" or on the "unilateral activity" of a plaintiff. . . . A forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum.

Calder v. Jones, 465 U.S. 783, illustrates the application of these principles. In *Calder,* a California actress brought a libel suit in California state court against a reporter and an editor, both of whom worked for the National Enquirer at its headquarters in Florida. The plaintiff's libel claims were based on an article written and edited by the defendants in Florida for publication in the National Enquirer, a national weekly newspaper with a California circulation of roughly 600,000.

We held that California's assertion of jurisdiction over the defendants was consistent with due process. Although we recognized that the defendants' activities "focus[ed]" on the plaintiff, our jurisdictional inquiry "focuse[d] on 'the relationship among the defendant, the forum, and the litigation.'" *Id.* at 788 (quoting *Shaffer,* 433 U.S. at 204). Specifically, we examined the various contacts the defendants had created with California (and not just with the plaintiff) by writing the allegedly libelous story.

We found those forum contacts to be ample: The defendants relied on phone calls to "California sources" for the information in their article; they wrote the story about the plaintiff's activities in California; they caused reputational injury in California by writing an allegedly libelous article that was widely circulated in the State; and the "brunt" of that injury was suffered by the plaintiff in that State. 465 U.S. at 788-89. "In sum, California [wa]s the focal point both of the story and of the harm suffered." *Id.* at 789. Jurisdiction over the defendants was "therefore proper in California based on the 'effects' of their Florida conduct in California." . . .

The crux of *Calder* was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. However scandalous a newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons. . . . Accordingly, the reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. Indeed, because publication to third persons is a necessary element of libel . . . the defendants' intentional tort actually occurred *in* California. *Keeton,* 465 U.S. at 777 ("The tort of libel is generally held to occur wherever the offending material is circulated"). In this way, the "effects" caused by the defendants' article—*i.e.,* the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to *California,* not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction. [7]

III

Applying the foregoing principles, we conclude that petitioner lacks the "minimal contacts" with Nevada that are a prerequisite to the exercise of jurisdiction over him. . . . It is undisputed that no part of petitioner's course of conduct occurred in Nevada. Petitioner approached, questioned, and searched respondents, and seized the cash at issue, in the Atlanta airport. It is alleged that petitioner later helped draft a "false probable cause affidavit" in Georgia and forwarded that affidavit to a United States Attorney's Office in Georgia to support a potential action for forfeiture of the seized funds. . . . Petitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens—whether the *defendant's* actions connect him to the *forum*—petitioner formed no jurisdictionally relevant contacts with Nevada.

The Court of Appeals reached a contrary conclusion by shifting the analytical focus from petitioner's contacts with the forum to his contacts with respondents. . . . Rather than assessing petitioner's own contacts with Nevada, the Court of Appeals looked to petitioner's knowledge of respondents' "strong forum connections." . . . In the court's view, that knowledge, combined with its conclusion that respondents suffered foreseeable harm in Nevada, satisfied the "minimum contacts" inquiry.

This approach to the "minimum contacts" analysis impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis. Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at

[7] The defendants in *Calder* argued that no contacts they had with California were sufficiently purposeful because their employer was responsible for circulation of the article. *See Calder v. Jones,* 465 U.S. 783, 789 (1984). We rejected that argument. Even though the defendants did not circulate the article themselves, they "expressly aimed" "their intentional, and allegedly tortious, actions" at California because they knew the National Enquirer "ha[d] its largest circulation" in California, and that the article would "have a potentially devastating impact" there. *Id.* at 789-90.

plaintiffs whom he knew had Nevada connections. Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections "decisive" in the jurisdictional analysis. *See Rush,* 444 U.S. at 332. It also obscures the reality that none of petitioner's challenged conduct had anything to do with Nevada itself.

Relying on *Calder,* respondents emphasize that they suffered the "injury" caused by petitioner's allegedly tortious conduct (*i.e.,* the delayed return of their gambling funds) while they were residing in the forum. . . . This emphasis is likewise misplaced. As previously noted, *Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.

Respondents' claimed injury does not evince a connection between petitioner and Nevada. Even if we consider the continuation of the seizure in Georgia to be a distinct injury, it is not the sort of effect that is tethered to Nevada in any meaningful way. Respondents (and only respondents) lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where respondents chose to be at a time when they desired to use the funds seized by petitioner. Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had. Unlike the broad publication of the forum-focused story in *Calder,* the effects of petitioner's conduct on respondents are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction. [9]

The Court of Appeals pointed to other possible contacts with Nevada, each ultimately unavailing. Respondents' Nevada attorney contacted petitioner in Georgia, but that is precisely the sort of "unilateral activity" of a third party that "cannot satisfy the requirement of contact with the forum State." *Hanson,* 357 U.S. at 253. Respondents allege that some of the cash seized in Georgia "originated" in Nevada, but that attenuated connection was not created by petitioner, and the cash was in Georgia, not Nevada, when petitioner seized it. Finally, the funds were eventually returned to respondents in Nevada, but petitioner had nothing to do with that return (indeed, it seems likely that it was respondents' unilateral decision to have their funds sent to Nevada).

Well-established principles of personal jurisdiction are sufficient to decide this case. The proper focus of the "minimum contacts" inquiry in intentional-tort cases is "'the relationship among

[9] Respondents warn that if we decide petitioner lacks minimum contacts in this case, it will bring about unfairness in cases where intentional torts are committed via the Internet or other electronic means (*e.g.,* fraudulent access of financial accounts or "phishing" schemes). As an initial matter, we reiterate that the "minimum contacts" inquiry principally protects the liberty of the nonresident defendant, not the interests of the plaintiff. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291-92 (1980). In any event, this case does not present the very different questions whether and how a defendant's virtual "presence" and conduct translate into "contacts" with a particular State. To the contrary, there is no question where the conduct giving rise to this litigation took place: Petitioner seized physical cash from respondents in the Atlanta airport, and he later drafted and forwarded an affidavit in Georgia. We leave questions about virtual contacts for another day.

the defendant, the forum, and the litigation.'" *Calder,* 465 U.S. at 788. And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State. In this case, the application of those principles is clear: Petitioner's relevant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction. We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

Notes and Questions

1. In what ways does *Walden* clarify the *Calder* decision? Does a fair reading of the *Walden* opinion establish that (1) the plaintiff cannot be the only link between the defendant and the forum State? (2) the mere fact that the plaintiff resides in the forum state is insufficient to establish purposeful contacts? (3) even though an injury was suffered by a resident of the forum state, that in and of itself is insufficient? and (4) even though it was "foreseeable" that harm could occur in the forum state, that fact alone is insufficient? Is the test now that the defendant's conduct must have given rise to "minimum contacts" with the forum State, connecting the defendant to the forum in a *meaningful* way?

2. At oral argument, the plaintiff's counsel argued that if the Court ruled that Nevada did not have personal jurisdiction over Walden, then victims of fraudulent schemes conducted over the internet would be unable to obtain personal jurisdiction in their home state over out-of-state perpetrators of that fraud. How should such a case be decided? For example, assume that a potential defendant sends out thousands of untargeted "phishing" emails without knowledge of the location where they will be read and a few persons from every state is duped into responding. Is the defendant's act of sending the emails sufficient to establish "purposeful contact" to satisfy that part of the "minimum contacts" analysis? In footnote 9 of its opinion, the Court specifically reserved that question for future decision.

3. In *Pruczinski v. Ashby*, 185 Wash. App. 876, 343 P.3d 382 (2016), Idaho residents brought action against an Idaho state trooper in a Superior Court in Spokane County, Washington. They sought to recover for injuries and property damage sustained during a traffic stop for suspected intoxication after the Idaho state trooper followed a vehicle across the Idaho border into Washington. The plaintiffs alleged that the trooper committed several common-law torts, including negligent infliction of emotional distress, assault, battery, unlawful imprisonment, tortious injury to personal property, and loss of consortium. Apparently, the trooper did not know he was in Washington at the time of the stop. The trooper was served process pursuant to the Washington long-arm statute is coextensive with federal due process law. The Washington Superior Court dismissed the action for lack of personal jurisdiction. The Washington Court of Appeal concluded due process was satisfied. Should this case have been dismissed in light of *Walden*? Are there significant differences?

2. General Jurisdiction

Insert at page 167 after Note 6 and before the Problems on that page:

Daimler AG v. Bauman
United States Supreme Court, 2013
571 U.S. __, 134 S. Ct. 746, 187 L. Ed. 2d 624

JUSTICE GINSBURG delivered the opinion of the Court, in which CHIEF JUSTICE ROBERTS and JUSTICES SCALIA, KENNEDY, THOMAS, BREYER, ALITO, AND KAGAN joined. JUSTICE SOTOMAYOR filed an opinion concurring in the judgment.

This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States. The litigation commenced in 2004, when twenty-two Argentinian residents [1] filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft (Daimler), [2] a German public stock company, headquartered in Stuttgart, that manufactures Mercedes-Benz vehicles in Germany. The complaint alleged that during Argentinas 1976–1983 "Dirty War," Daimlers Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.

The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint. Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise. For example, as plaintiffs' counsel affirmed, under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California. . . . Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. __ (2011), we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporations affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." *Id.* at __. Instructed by *Goodyear*, we conclude Daimler is not "at

home" in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentinas conduct in Argentina.

I

In 2004, plaintiffs (respondents here) filed suit in the United States District Court for the Northern District of California, alleging that MB Argentina collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives during the military dictatorship in place there from 1976 through 1983, a period known as Argentina's "Dirty War." Based on those allegations, plaintiffs asserted claims under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350, as well as claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. The incidents recounted in the complaint center on MB Argentinas plant in Gonzalez Catan, Argentina; no part of MB Argentina's alleged collaboration with Argentinian authorities took place in California or anywhere else in the United States.

Plaintiffs' operative complaint names only one corporate defendant: Daimler, the petitioner here. Plaintiffs seek to hold Daimler vicariously liable for MB Argentina's alleged malfeasance. Daimler is a German *Aktiengesellschaft* (public stock company) that manufactures Mercedes-Benz vehicles in Germany and has its headquarters in Stuttgart. At times relevant to this case, MB Argentina was a subsidiary wholly owned by Daimler's predecessor in interest.

Daimler moved to dismiss the action for want of personal jurisdiction. Opposing the motion, plaintiffs submitted declarations and exhibits purporting to demonstrate the presence of Daimler itself in California. Alternatively, plaintiffs maintained that jurisdiction over Daimler could be founded on the California contacts of MBUSA, a distinct corporate entity that, according to plaintiffs, should be treated as Daimler's agent for jurisdictional purposes.

MBUSA, an indirect subsidiary of Daimler, is a Delaware limited liability corporation.[3] MBUSA serves as Daimler's exclusive importer and distributor in the United States, purchasing Mercedes-Benz automobiles from Daimler in Germany, then importing those vehicles, and ultimately distributing them to independent dealerships located throughout the Nation. Although MBUSA's principal place of business is in New Jersey, MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine. According to the record developed below, MBUSA is the largest supplier of luxury vehicles to the California market. In particular, over 10% of all sales of new vehicles in the United States take place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales.

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[1] One plaintiff is a resident of Argentina and a citizen of Chile; all other plaintiffs are residents and citizens of Argentina.

[2] Daimler was restructured in 2007 and is now known as Daimler AG. No party contends that any postsuit corporate reorganization bears on our disposition of this case. This opinion refers to members of the Daimler corporate family by the names current at the time plaintiffs filed suit.

[3] At times relevant to this suit, MBUSA was wholly owned by DaimlerChrysler North America Holding Corporation, a Daimler subsidiary.

The relationship between Daimler and MBUSA is delineated in a General Distributor Agreement, which sets forth requirements for MBUSA's distribution of Mercedes-Benz vehicles in the United States. That agreement established MBUSA as an "independent contracto[r]" that "buy[s] and sell[s] [vehicles] . . . as an independent business for [its] own account." . . . The agreement "does not make [MBUSA] . . . a general or special agent, partner, joint venturer or employee of DAIMLERCHRYSLER or any DaimlerChrysler Group Company"; MBUSA "ha[s] no authority to make binding obligations for or act on behalf of DAIMLERCHRYSLER or any DaimlerChrysler Group Company." . . .

After allowing jurisdictional discovery on plaintiffs' agency allegations, the District Court granted Daimler's motion to dismiss. Daimler's own affiliations with California, the court first determined, were insufficient to support the exercise of all-purpose jurisdiction over the corporation. . . . Next, the court declined to attribute MBUSA's California contacts to Daimler on an agency theory, concluding that plaintiffs failed to demonstrate that MBUSA acted as Daimler's agent. . . .

The Ninth Circuit at first affirmed the District Courts judgment. Addressing solely the question of agency, the Court of Appeals held that plaintiffs had not shown the existence of an agency relationship of the kind that might warrant attribution of MBUSA's contacts to Daimler. *Bauman v. DaimlerChrysler Corp.,* 579 F.3d 1088, 1096–1097 (9th Cir. 2009). Judge Reinhardt dissented. In his view, the agency test was satisfied and considerations of "reasonableness" did not bar the exercise of jurisdiction. *Id.* at 1098-1106. Granting plaintiffs petition for rehearing, the panel withdrew its initial opinion and replaced it with one authored by Judge Reinhardt, which elaborated on reasoning he initially expressed in dissent. *Bauman v. DaimlerChrysler Corp.,* 644 F.3d 909 (9th Cir. 2011).

Daimler petitioned for rehearing and rehearing en banc, urging that the exercise of personal jurisdiction over Daimler could not be reconciled with this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. (2011). Over the dissent of eight judges, the Ninth Circuit denied Daimlers petition. *See Bauman v. DaimlerChrysler Corp.,* 676 F.3d 774 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing en banc).

We granted certiorari to decide whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad. . . .

II

Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. *See* Fed. R. Civ. P. 4(k)(1)(A) (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"). Under California's long-arm statute, California state courts may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this

state or of the United States." Cal. Civ. Proc. Code Ann. § 410.10 (West 2004). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. We therefore inquire whether the Ninth Circuit's holding comports with the limits imposed by federal due process. *See, e.g., Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 464 (1985).

III

In *Pennoyer v. Neff,* 95 U.S. 714 (1878), decided shortly after the enactment of the Fourteenth Amendment, the Court held that a tribunals jurisdiction over persons reaches no farther than the geographic bounds of the forum. *See id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). *See also Shaffer v. Heitner,* 433 U.S. 186, 197 (1977) (Under *Pennoyer,* "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the States power."). In time, however, that strict territorial approach yielded to a less rigid understanding, spurred by "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity." *Burnham v. Superior Court,* 495 U.S. 604, 617 (1990) (opinion of Scalia, J.).

"The canonical opinion in this area remains *International Shoe* [*Co. v. Washington*], 326 U.S. 310 (1945)], in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Goodyear,* 564 U.S. at (quoting *International Shoe,* 326 U.S. at 316). Following *International Shoe,* "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer,* 433 U.S. at 204.

International Shoe's conception of "fair play and substantial justice" presaged the development of two categories of personal jurisdiction. The first category is represented by *International Shoe* itself, a case in which the in-state activities of the corporate defendant "ha[d] not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on." 326 U.S. at 317. *International Shoe* recognized, as well, that "the commission of some single or occasional acts of the corporate agent in a state" may sometimes be enough to subject the corporation to jurisdiction in that States tribunals with respect to suits relating to that in-state activity. *Id.* at 318. Adjudicatory authority of this order, in which the suit "aris[es] out of or relate[s] to the defendants contacts with the forum," *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, n.8 (1984), is today called "specific jurisdiction." *See Goodyear,* 564 U.S. at (citing von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-63 (1966) (hereinafter von Mehren & Trautman)).

International Shoe distinguished between, on the one hand, exercises of specific jurisdiction, as just described, and on the other, situations where a foreign corporations "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes

of action arising from dealings entirely distinct from those activities." 326 U.S. at 318. As we have since explained, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear,* 564 U.S. at __; *see id.* at __; *Helicopteros,* 466 U.S. at 414, n.9.[5]

Since *International Shoe,* "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Goodyear,* 564 U.S. at ___ (quoting Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 628 (1988)). *International Shoe*'s momentous departure from *Pennoyer* s rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum. Our subsequent decisions have continued to bear out the prediction that "specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene." von Mehren & Trautman at 1164.

Our post-*International Shoe* opinions on general jurisdiction, by comparison, are few. "[The Court's] 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Goodyear,* 564 U.S. at (internal quotation marks and brackets omitted). The defendant in *Perkins*, Benguet, was a company incorporated under the laws of the Philippines, where it operated gold and silver mines. Benguet ceased its mining operations during the Japanese occupation of the Philippines in World War II; its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities. *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 448 (1952). The plaintiff, an Ohio resident, sued Benguet on a claim that neither arose in Ohio nor related to the corporation's activities in that State. We held that the Ohio courts could exercise general jurisdiction over Benguet without offending due process. *Id.* That was so, we later noted, because "Ohio was the corporation's principal, if temporary, place of business." *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 780, n.11 (1984).[8]

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[5] Colloquy at oral argument illustrated the respective provinces of general and specific jurisdiction over persons. Two hypothetical scenarios were posed: *First,* if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler in California court alleging that the vehicle was defectively designed, that courts adjudicatory authority would be premised on specific jurisdiction. . . . (Daimler's counsel acknowledged that specific jurisdiction "may well be . . . available" in such a case, depending on whether Daimler purposefully availed itself of the forum). *Second,* if a similar accident took place in Poland and injured Polish plaintiffs sued Daimler in California court, the question would be one of general jurisdiction. . . . ([O]n plaintiff's view, Daimler would be amenable to such a suit in California).

[8] Selectively referring to the trial court record in *Perkins* (as summarized in an opinion of the intermediate appellate court), Justice Sotomayor posits that Benguet may have had extensive operations in places other than Ohio. . . . ("By the time the suit [in *Perkins*] was commenced, the company had resumed its considerable operations in the Philippines," "rebuilding its properties there" and "purchasing machinery, supplies and equipment."). . . . (many of the corporations "key management decisions" were made by the out-of-state purchasing agent and chief of staff). Justice Sotomayor's account overlooks this Court's opinion in *Perkins* and the point on which that opinion turned: All of Benguet's activities were directed by the company's president from within Ohio. See *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 447–448 (1952) (company's Philippine mining operations "were completely halted during the occupation . . . by the Japanese"; and the company's president, from his Ohio

The next case on point, *Helicopteros,* 466 U.S. 408, arose from a helicopter crash in Peru. Four U.S. citizens perished in that accident; their survivors and representatives brought suit in Texas state court against the helicopters owner and operator, a Colombian corporation. That company's contacts with Texas were confined to "sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas-based helicopter company] for substantial sums; and sending personnel to [Texas] for training." *Id.* at 416. Notably, those contacts bore no apparent relationship to the accident that gave rise to the suit. We held that the company's Texas connections did not resemble the "continuous and systematic general business contacts . . . found to exist in *Perkins*." *Id.* "[M]ere purchases, even if occurring at regular intervals," we clarified, "are not enough to warrant a States assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.* at 418.

Most recently, in *Goodyear*, we answered the question: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?"64 U.S. at __. That case arose from a bus accident outside Paris that killed two boys from North Carolina. The boy's parents brought a wrongful-death suit in North Carolina state court alleging that the bus's tire was defectively manufactured. The complaint named as defendants not only The Goodyear Tire and Rubber Company (Goodyear), an Ohio corporation, but also Goodyear's Turkish, French, and Luxembourgian subsidiaries. Those foreign subsidiaries, which manufactured tires for sale in Europe and Asia, lacked any affiliation with North Carolina. A small percentage of tires manufactured by the foreign subsidiaries were distributed in North Carolina, however, and on that ground, the North Carolina Court of Appeals held the subsidiaries amenable to the general jurisdiction of North Carolina courts.

We reversed, observing that the North Carolina courts analysis "elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Id.* at . Although the placement of a product into the stream of commerce "may bolster an affiliation germane to *specific* jurisdiction," we explained, such contacts "do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Id.* at __. As *International Shoe* itself teaches, a corporation's "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U.S. at 318. Because

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foffice, "supervised policies dealing with the rehabilitation of the corporations properties in the Philippines and . . . dispatched funds to cover purchases of machinery for such rehabilitation"). On another day, Justice Sotomayor joined a unanimous Court in recognizing: "To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio. . . ." *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. __ (2011). Given the wartime circumstances, Ohio could be considered "a surrogate for the place of incorporation or head office." von Mehren & Trautman at 1144. *See also id.* (*Perkins* "should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction" based on nothing more than a corporation's "doing business" in a forum).

Justice Sotomayor emphasizes *Perkins'* statement that Benguet's Ohio contacts, while "continuous and systematic," were but a "limited . . . part of its general business." 342 U.S. at 438. Describing the company's "wartime activities" as "necessarily limited," *Id.* at 448, however, this Court had in mind the diminution in operations resulting from the Japanese occupation and the ensuing shutdown of the company's Philippine mines. No fair reader of the full opinion in *Perkins* could conclude that the Court meant to convey anything other than that Ohio was the center of the corporation's wartime activities. . . .

Goodyear's foreign subsidiaries were "in no sense at home in North Carolina," we held, those subsidiaries could not be required to submit to the general jurisdiction of that States courts. 564 U.S. at __; *see also J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. __, __ (2011) (Ginsburg, J., dissenting) (noting unanimous agreement that a foreign manufacturer, which engaged an independent U.S.-based distributor to sell its machines throughout the United States, could not be exposed to all-purpose jurisdiction in New Jersey courts based on those contacts).

As is evident from *Perkins*, *Helicopteros,* and *Goodyear*, general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer's* sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized.[9] As this Court has increasingly trained on the "relationship among the defendant, the forum, and the litigation," *Shaffer*, 433 U.S. at 204, *i.e.*, specific jurisdiction,[10] general jurisdiction has come to occupy a less dominant place in the contemporary scheme.

IV

With this background, we turn directly to the question whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts. In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the *specific* jurisdiction category. Nor did plaintiffs challenge on appeal the District Courts holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction. While plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point have they maintained that MBUSA is an alter ego of Daimler.

Daimler, on the other hand, failed to object below to plaintiff's assertion that the California courts could exercise all-purpose jurisdiction over MBUSA.[12]. . . We will assume then, for purposes of this decision only, that MBUSA qualifies as at home in California.

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[9] *See generally* von Mehren & Trautman at 1177–79; *see also* Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 676 (1988) ("[W]e do not need to justify broad exercises of dispute-blind jurisdiction unless our interpretation of the scope of specific jurisdiction unreasonably limits state authority over nonresident defendants."); Borchers, *The Problem With General Jurisdiction*, 2001 U. Chi. Legal Forum 119, 139 ("[G]eneral jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.").

[10] Remarkably, Justice Sotomayor treats specific jurisdiction as though it were barely there. Given the many decades in which specific jurisdiction has flourished, it would be hard to conjure up an example of the "deep injustice" Justice Sotomayor predicts as a consequence of our holding that California is not an all-purpose forum for suits against Daimler. . . . Justice Sotomayor identifies "the concept of reciprocal fairness" as the "touchstone principle of due process in this field.". . . (citing *International Shoe,* 326 U.S. at 319). She overlooks, however, that in the very passage of *International Shoe* on which she relies, the Court left no doubt that it was addressing specific—not general—jurisdiction. *See id.* at 319 ("The exercise of th[e] privilege [of conducting corporate activities within a State] may give rise to obligations, and, *so far as those obligations arise out of or are connected with the activities within the state,* a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (emphasis added)).

[11] As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations "so 'continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State." 564 U.S. at __, *i.e.,* comparable to a domestic enterprise in that State.

[12] MBUSA is not a defendant in this case.

A

In sustaining the exercise of general jurisdiction over Daimler, the Ninth Circuit relied on an agency theory, determining that MBUSA acted as Daimler's agent for jurisdictional purposes and then attributing MBUSA's California contacts to Daimler. The Ninth Circuit's agency analysis derived from Circuit precedent considering principally whether the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporations own officials would undertake to perform substantially similar services." 644 F.3d at 920 (quoting *Doe v. Unocal Corp.,* 248 F.3d 915, 928 (9th Cir. 2001) (emphasis deleted).

This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary. Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego. The Ninth Circuit adopted a less rigorous test based on what it described as an "agency" relationship. Agencies, we note, come in many sizes and shapes: "One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose." . . . [13] A subsidiary, for example, might be its parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere. The Court of Appeals did not advert to that prospect. But we need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals courts analysis be sustained.

The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: "Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means if the independent contractor, subsidiary, or distributor did not exist." 676 F.3d at 777 (O'Scannlain, J., dissenting from denial of rehearing en banc). The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear*. 564 U.S. at __. [15]

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[13] Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction. "[T]he corporate personality," *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), observed, "is a fiction, although a fiction intended to be acted upon as though it were a fact." *Id.* at 316. . . . It does not inevitably follow, however, that similar reasoning applies to *general* jurisdiction. *Cf. Goodyear,* 564 U.S. at ___ (faulting analysis that "elided the essential difference between case-specific and all-purpose (general) jurisdiction").

[15] The Ninth Circuit's agency analysis also looked to whether the parent enjoys "the right to substantially control" the subsidiary's activities. . . . The Court of Appeals found the requisite "control" demonstrated by the General Distributor Agreement between Daimler and MBUSA, which gives Daimler the right to oversee certain of MBUSA's operations, even though that agreement expressly disavowed the creation of any agency relationship. Thus grounded, the separate inquiry into control hardly curtails the over breadth of the Ninth Circuits agency holding.

B

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.

Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individuals domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." 564 U.S. at __ (citing Brilmayer *et al.*, *A General Look at General Jurisdiction*, 66 Texas L. Rev. 721, 728 (1988)). With respect to a corporation, the place of incorporation and principal place of business are "paradig[m] . . . bases for general jurisdiction." *Id.* at 735. *See also* Twitchell, 101 Harv. L. Rev. at 633. Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. . . .

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business.". . .

As noted . . . , the words "continuous and systematic" were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. See 326 U.S. at 317 (jurisdiction can be asserted where a corporations in-state activities are not only "continuous and systematic, but also give rise to the liabilities sued on"). [17] Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . *on causes of action arising from dealings entirely distinct from those activities*." *Id.* at 318 (emphasis added). *See also* Twitchell, *Why We Keep Doing Business With Doing-Business Jurisdiction*, 2001 U. Chi. Legal Forum 171, 184 (*International Shoe* "is clearly not saying that dispute-blind jurisdiction exists whenever 'continuous and systematic' contacts are found."). [18] Accordingly, the inquiry under

[17] *International Shoe* also recognized . . . that "some single or occasional acts of the corporate agent in a state . . ., because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." 326 U.S. at 318.

[18] Plaintiffs emphasize two decisions, *Barrow S.S. Co. v. Kane,* 170 U.S. 100 (1898), and *Tauza v. Susquehanna Coal Co.,* 115 N.E. 915 (1917) (Cardozo, J.), both cited in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437 (1952), just after the statement that a corporations continuous operations in-state may suffice to establish general jurisdiction. *Id.* at 446, and n.6; *see also International Shoe,* 326 U.S. at 318 (citing *Tauza*). *Barrow* and *Tauza* indeed upheld the exercise of general jurisdiction based on the presence of a local office, which signaled that the corporation was "doing business" in the forum. *Perkins'* unadorned citations to these cases, both decided in the era dominated by *Pennoyer's* territorial thinking . . . should not attract heavy reliance today. *See generally* Feder, Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 671 (2012) (questioning whether "doing business" should persist as a basis for general jurisdiction).

Goodyear is not whether a foreign corporations in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." 564 U.S. at ___.[19]

Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.,* 471 U.S. at 472 (internal quotation marks omitted).

It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.[20]

C

Finally, the transnational context of this dispute bears attention. The Court of Appeals emphasized, as supportive of the exercise of general jurisdiction, plaintiff's assertion of claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350. *See* 644 F.3d at 927 ("American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses."). Recent decisions of this Court, however, have rendered plaintiff's ATS and TVPA claims infirm. *See Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. __, ___ (2013) (presumption against extraterritorial application controls claims under the ATS); *Mohamad v. Palestinian Auth.,* 566 U.S.__, __ (2012) (only natural persons are subject to liability under the TVPA).

. . . .

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is

Reversed.

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[19] We do not foreclose the possibility that in an exceptional case, *see, e.g., Perkins*, . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, . . . quite another to expose it to suit on claims having no connection whatsoever to the forum State.

[20] To clarify in light of Justice Sotomayor's opinion concurring in the judgment, the general jurisdiction inquiry does not "focu[s] solely on the magnitude of the defendant's in-state contacts." . . . General jurisdiction instead calls for an appraisal of a

JUSTICE SOTOMAYOR, concurring in the judgment.

I agree with the Court's conclusion that the Due Process Clause prohibits the exercise of personal jurisdiction over Daimler in light of the unique circumstances of this case. I concur only in the judgment, however, because I cannot agree with the path the Court takes to arrive at that result.

. . . .

The Court's [path] is wrong as a matter of both process and substance. As to process, the Court decides this case on a ground that was neither argued nor passed on below, and that Daimler raised for the first time in a footnote to its brief. . . . As to substance, the Court's focus on Daimler's operations outside of California ignores the lodestar of our personal jurisdiction jurisprudence: A State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State's laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial.

Regrettably, these errors are unforced. The Court can and should decide this case on the far simpler ground that, no matter how extensive Daimler's contacts with California, that State's exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available. Because I would reverse the judgment below on this ground, I concur in the judgment only.

. . . .

Until today, our precedents had established a straightforward test for general jurisdiction: Does the defendant have "continuous corporate operations within a state" that are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct

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corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States. . . . Nothing in *International Shoe* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of . . . activity" having no connection to any in-state activity. . . .

Justice Sotomayor would reach the same result, but for a different reason. Rather than concluding that Daimler is not at home in California, Justice Sotomayor would hold that the exercise of general jurisdiction over Daimler would be unreasonable "in the unique circumstances of this case." . . . In other words, she favors a resolution fit for this day and case only. True, a multipronged reasonableness check was articulated in *Asahi,* 480 U.S. at 113-14, but not as a free-floating test. Instead, the check was to be essayed when *specific* jurisdiction is at issue. See also *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476-78, (1985). First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case. When a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous.

Justice Sotomayor fears that our holding will "lead to greater unpredictability by radically expanding the scope of jurisdictional discovery." . . . But it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home. Justice Sotomayor's proposal to import *Asahi's* "reasonableness" check into the general jurisdiction determination, on the other hand, would indeed compound the jurisdictional inquiry. The reasonableness factors identified in *Asahi* include "the burden on the defendant," "the interests of the forum State," "the plaintiffs interest in obtaining relief," "the interstate judicial systems interest in obtaining the most efficient resolution of controversies," "the shared interest of the several States in furthering fundamental substantive social policies," and, in the international context, "the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction." 480 U.S. at 113-15. Imposing such a checklist in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of litigation.

from those activities"? *International Shoe Co. v. Washington,* 326 U.S. 310, 318 (1945); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984) (asking whether defendant had "continuous and systematic general business contacts").[6] In every case where we have applied this test, we have focused solely on the magnitude of the defendant's in-state contacts, not the relative magnitude of those contacts in comparison to the defendant's contacts with other States.

. . . .

Most recently, in *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. __ (2011), our analysis again focused on the defendants in-state contacts. *Goodyear* involved a suit against foreign tire manufacturers by North Carolina residents whose children had died in a bus accident in France. We held that North Carolina courts could not exercise general jurisdiction over the foreign defendants. Just as in *Perkins* and *Helicopteros,* our opinion in *Goodyear* did not identify the defendant's contacts outside of the forum State, but focused instead on the defendant's lack of offices, employees, direct sales, and business operations within the State.

This approach follows from the touchstone principle of due process in this field, the concept of reciprocal fairness. When a corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts. . . . The majority's focus on the extent of a corporate defendant's out-of-forum contacts is untethered from this rationale. After all, the degree to which a company intentionally benefits from a forum State depends on its interactions with that State, not its interactions elsewhere. An article on which the majority relies (and on which *Goodyear* relied as well, 564 U.S. at __) expresses the point well: "We should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states. . . . [T]he amount of activity elsewhere seems virtually irrelevant to . . . the imposition of general jurisdiction over a defendant." Brilmayer *et al.*, *A General Look at General Jurisdiction*, 66 Texas L. Rev. 721, 742 (1988).

Had the majority applied our settled approach, it would have had little trouble concluding that Daimler's California contacts rise to the requisite level . . . . Our cases have long stated the rule that a defendant's contacts with a forum State must be continuous, substantial, and systematic in order for the defendant to be subject to that States general jurisdiction. . . . *See Perkins,* 342 U.S. at 446. We offered additional guidance in *Goodyear*, adding the phrase "essentially at home" to our prior formulation of the rule. 564 U.S. at (a State may exercise general jurisdiction where a defendant's "affiliations with the State are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State"). We used the phrase "at home" to signify that in order for an out-of-state defendant to be subject to general jurisdiction, its continuous and substantial

[6] While *Helicopteros* formulated the general jurisdiction inquiry as asking whether a foreign defendant possesses "continuous and systematic general business contacts," 466 U.S. at 416, the majority correctly notes . . . that *International Shoe* used the phrase "continuous and systematic" in the context of discussing specific jurisdiction, 326 U.S. at 317. But the majority recognizes that *International Shoe* separately described the type of contacts needed for general jurisdiction as "continuous corporate operations" that are "so substantial" as to justify suit on unrelated causes of action. *Id*. at 318. It is unclear why our precedents departed from *International Shoe's* "continuous and substantial" formulation in favor of the "continuous and systematic" formulation, but the majority does not contend—nor do I perceive—that there is a material difference between the two.

contacts with a forum State must be akin to those of a local enterprise that actually is "at home" in the State.[8]

Under this standard, Daimler's concession that MBUSA is subject to general jurisdiction in California (a concession the Court accepts . . .) should be dispositive. For if MBUSA's California contacts are so substantial and the resulting benefits to MBUSA so significant as to make MBUSA "at home" in California, the same must be true of Daimler when MBUSA's contacts and benefits are viewed as its own. Indeed, until a footnote in its brief before this Court, even Daimler did not dispute this conclusion for eight years of the litigation.

. . . .

The majority today concludes otherwise. Referring to the "continuous and systematic" contacts inquiry that has been taught to generations of first-year law students as "unacceptably grasping," . . . the majority announces the new rule that in order for a foreign defendant to be subject to general jurisdiction, it must not only possess continuous and systematic contacts with a forum State, but those contacts must also surpass some unspecified level when viewed in comparison to the company's "nationwide and worldwide" activities.[9]

Neither of the majority's two rationales for this proportionality requirement is persuasive. First, the majority suggests that its approach is necessary for the sake of predictability. Permitting general jurisdiction in every State where a corporation has continuous and substantial contacts, the majority asserts, would "scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" . . . But there is nothing unpredictable about a rule that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one. The majority may not favor that rule as a matter of policy, but such disagreement does not render an otherwise routine test unpredictable.

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[8] The majority views the phrase "at home" as serving a different purpose—that of requiring a comparison between a defendants in-state and out-of-state contacts. . . . That cannot be the correct understanding though, because among other things it would cast grave doubt on *Perkins*—a case that *Goodyear* pointed to as an exemplar of general jurisdiction . . . . For if *Perkins* had applied the majority's newly minted proportionality test, it would have come out the other way.

The majority apparently thinks that the Philippine corporate defendant in *Perkins* did not have meaningful operations in places other than Ohio. . . . But one cannot get past the second sentence of *Perkins* before realizing that is wrong. That sentence reads: "The corporation has been carrying on in Ohio a continuous and systematic, but limited, part of its general business." 342 U.S. at 438. . . .

In light of these facts, it is all but impossible to reconcile the result in *Perkins* with the proportionality test the majority announces today. *Goodyear* s use of the phrase "at home" is thus better understood to require the same general jurisdiction inquiry that *Perkins* required: An out-of-state business must have the kind of continuous and substantial in-state presence that a parallel local company would have.

[9] I accept at face value the majority's declaration that general jurisdiction is not limited to a corporation's place of incorporation and principal place of business because "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in the State." . . . . Were that not so, our analysis of the defendant's in-state contacts in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437 (1952), *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984), and *Goodyear* would have been irrelevant, as none of the defendants in those cases was sued in its place of incorporation or principal place of business.

Nor is the majority's proportionality inquiry any more predictable than the approach it rejects. If anything, the majority's approach injects an additional layer of uncertainty because a corporate defendant must now try to foretell a courts analysis as to both the sufficiency of its contacts with the forum State itself, as well as the relative sufficiency of those contacts in light of the company's operations elsewhere. Moreover, the majority does not even try to explain just how extensive the company's in-state contacts must be in the context of its global operations in order for general jurisdiction to be proper.

The majority's approach will also lead to greater unpredictability by radically expanding the scope of jurisdictional discovery. Rather than ascertaining the extent of a corporate defendant's forum-state contacts alone, courts will now have to identify the extent of a company's contacts in every other forum where it does business in order to compare them against the company's in-state contacts. . . .

Absent the predictability rationale, the majority's sole remaining justification for its proportionality approach is its unadorned concern for the consequences. "If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California," the majority laments, "the same global reach would presumably be available in every other State in which MBUSA's sales are sizable.". . .

The majority characterizes this result as "exorbitant," . . . but in reality it is an inevitable consequence of the rule of due process we set forth nearly 70 years ago, that there are "instances in which [a company's] continuous corporate operations within a state" are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities," *International Shoe,* 326 U.S. at 318. . . . Just as it was fair to say in the 1940's that an out-of-state company could enjoy the benefits of a forum State enough to make it "essentially at home" in the State, it is fair to say today that a multinational conglomerate can enjoy such extensive benefits in multiple forum States that it is "essentially at home" in each one.

In any event, to the extent the majority is concerned with the modern-day consequences of *International Shoe's* conception of personal jurisdiction, there remain other judicial doctrines available to mitigate any resulting unfairness to large corporate defendants. Here, for instance, the reasonableness prong may afford petitioner relief. . . . In other cases, a defendant can assert the doctrine of *forum non conveniens* if a given State is a highly inconvenient place to litigate a dispute. *See Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947). In still other cases, the federal change of venue statute can provide protection. *See* 28 U.S.C. § 1404(a) (permitting transfers to other districts "[f]or the convenience of parties and witnesses" and "in the interests of justice"). And to the degree that the majority worries these doctrines are not enough to protect the economic interests of multinational businesses . . . , the task of weighing those policy concerns belongs ultimately to legislators, who may amend state and federal long-arm statutes in accordance with the democratic process. Unfortunately, the majority short circuits that process by enshrining today's narrow rule of general jurisdiction as a matter of constitutional law.

. . . .

The majority's concern for the consequences of its decision should have led it the other way, because the rule that it adopts will produce deep injustice in at least four respects.

First, the majority's approach unduly curtails the State's sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries. . . .

Second, the proportionality approach will treat small businesses unfairly in comparison to national and multinational conglomerates. Whereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be. For instance, the majority holds today that Daimler is not subject to general jurisdiction in California despite its multiple offices, continuous operations, and billions of dollars worth of sales there. But imagine a small business that manufacturers luxury vehicles principally targeting the California market and that has substantially all of its sales and operations in the State—even though those sales and operations may amount to one-thousandth of Daimler's. Under the majority rule, that small business will be subject to suit in California on any cause of action involving any of its activities anywhere in the world, while its far more pervasive competitor, Daimler, will not be. That will be so even if the small business incorporates and sets up its headquarters elsewhere (as Daimler does), since the small business California sales and operations would still predominate when "apprais[ed]" in proportion to its minimal "nationwide and worldwide" operations . . . .

Third, the majority's approach creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit, Burnham v. Superior Court, 495 U.S. 604 (1990), but a large corporation that owns property, employs workers, and does billions of dollars worth of business in the State will not be, simply because the corporation has similar contacts elsewhere (though the visiting individual surely does as well).

Finally, it should be obvious that the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions. Under the majority rule, for example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States. . . .[12]

The Court rules against respondents today on a ground that no court has considered in the history of this case, that this Court did not grant certiorari to decide, and that Daimler raised only in

[12] The present case and the examples posited involve foreign corporate defendants, but the principle announced by the majority would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. State. Under the majority's rule, for example, a General Motors autoworker who retires to Florida would be unable to sue GM in that State for disabilities that develop from the retirees' labor at a Michigan parts plant, even though GM undertakes considerable business operations in Florida. *See* Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 670 (1988).

a footnote of its brief. In doing so, the Court adopts a new rule of constitutional law that is unmoored from decades of precedent. Because I would reverse the Ninth Circuit's decision on the narrower ground that the exercise of jurisdiction over Daimler would be unreasonable in any event, I respectfully concur in the judgment only.

Notes and Questions

1. In her concurring opinion, Justice Sotomayor complains that the majority of the Court has decided the case on a ground that was neither argued nor passed on below. In the petitioner's petition for certiorari, the petitioner stated as follows: "The question presented is whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." Brief of Petitioner at i, *DaimlerCrysler AG v. Bauman*, 571 U.S. __, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2013) (No. 11-965), 2012 WL 379768. Do you think Justice Sotmayor has a legitimate complaint? Why do you think the Court decided the case in the way that it did?

2. To what extent, if any, does *Diamler* give further meaning to the concept of "at home"?

3. Does Justice Sotomayor appear to be correct in saying that the majority's approach significantly changes the "systematic and continuous" test, at least as it has been verbalized in opinions prior to *Diamler*?

4. What does the majority have to say about the role of the reasonableness test in general jurisdiction cases? In the context of general jurisdiction, does the decision not to use the test make sense?

5. Assume that a U.S. company enters into a contract in a foreign country to sell its products to a multinational company there. If the multinational company breaches the contract, will the U.S. company be allowed to sue the multinational company in the United States when it has considerable operations in numerous U.S. forums?

Section G. Statutory and Rule Requirements for Notice and Service of Process

1. Method and Manner of Service

Insert at page 194 at the end of Note 3:

Under the 2015 proposed amendments to the Federal Rules, the time within which a defendant must be served following the filing of the complaint is shortened to 90 days.

2. Waiver of Service

Insert at page 195 at the end of the carry-over paragraph:

Note that the abrogation of Rule 84 and the Appendix of Forms became effective December 1, 2015. Forms 5 and 6, which as noted above deal respectively with requests to waive service and a waiver of service and summons, are now appended to Rule 4.

* * * * *

Chapter 3

Venue and Related Matters

Section C. Forum-Selection Clauses

Insert at page 235 at the end of Note 2(a) in the *Notes and Questions*:

The Supreme Court subsequently resolved this issue in *Atlantic Marine Construction Co. v. United States District Court*, 571 U.S. __, 134 S. Ct. 568 (2013). In *Atlantic Marine*, the Court held that the proper procedural mechanism for raising an issue involving a forum-selection clause is a motion to transfer under § 1404(a), and not a motion to dismiss for improper venue under Rule 12(b)(3) and § 1406(a). In such circumstances, according to the Court, the private interest factors ordinarily considered under § 1404(a), would be irrelevant because of the clause. The Court held that when the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause, and "only under extraordinary circumstances unrelated to the convenience of the parties should a §1404(a) motion be denied."

The Court further held that in cases involving forum-selection clauses pointing to state or foreign forums, the same standard should apply in deciding a motion to dismiss for forum non conveniens. As the Court held:

> In the typical case not involving a forum-selection clause, a district court considering a § 1404(a) motion (or a *forum non conveniens* motion) must evaluate both the convenience of the parties and various public-interest considerations. Ordinarily, the district court would weigh the relevant factors and decide whether, on balance, a transfer would serve "the convenience of parties and witnesses" and otherwise promote "the interest of justice." § 1404(a).
>
> The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which "represents the parties' agreement as to the most proper forum." …. The "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." …. For that reason, and because the overarching consideration under § 1404(a) is whether a transfer would promote "the interest of justice," "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases."
> … .
>
> When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations

> and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain.

Insert at page 235 at the end of Note 2(b) in the *Notes and Questions*:

The Court declined to answer the question whether a party seeking to enforce a forum-selection clause in federal court could avoid being subjected to *any* discretion by the court pursuant to a motion to transfer under § 1404(a) by instead moving to dismiss under Rule 12(b)(6) for failure to state a claim based on the plaintiff's breach of the forum-selection clause. As the Court stated:

> An *amicus* before the Court argues that a defendant in a breach-of-contract action should be able to obtain dismissal under Rule 12(b)(6) if the plaintiff files suit in a district other than the one specified in a valid forum-selection clause. . . . Petitioner, however, did not file a motion under Rule 12(b)(6), and the parties did not brief the Rule's application to this case at any stage of this litigation. We therefore will not consider it. Even if a defendant could use Rule 12(b)(6) to enforce a forum-selection clause, that would not change our conclusions that § 1406(a) and Rule 12(b)(3) are not proper mechanisms to enforce a forum-selection clause and that § 1404(a) and the *forum non conveniens* doctrine provide appropriate enforcement mechanisms.

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Chapter 4

Subject Matter Jurisdiction

Section B. Federal Question Jurisdiction

2. Scope of the Statutory Grant

(c) The "Well-Pleaded Complaint" Rule

Add the following note to *Notes and Questions* at page 253:

7. In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 577 U.S. ___, 136 S. Ct. 1562 (2016), the Court applied § 1331's "arising under" standard to define the subject-matter jurisdiction of federal courts over federal Securities Exchange Act litigation. (The Securities Exchange Act of 1934 requires companies to publically disclose information that investors would find pertinent to making investment decisions; it also regulates the markets on which securities are sold as well as the participants in those markets, including industry associations, brokers, and issuers.) In *Manning*, Manning sued Merrill Lynch in a New Jersey state court for alleged violations of New Jersey law arising from improper "naked short sales," which caused the share price of a particular stock to plummet. Manning's complaint did not allege a violation of the Securities Exchange Act of 1934. (However, the complaint did allege past violations of a regulation promulgated under the Exchange Act and suggested that the challenged short sales violated the regulation as well as New Jersey law.) Merrill Lynch removed to federal district court under Section 27 of the Exchange Act. That section confers exclusive federal subject-matter jurisdiction over claims under the Act "in all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules or regulations thereunder." 15 U.S.C. § 78aa(a). Manning moved to remand to state court on the ground of lack of subject-matter jurisdiction.

Despite the differences in wording in § 27 of the Exchange Act ("brought to enforce") and § 1331 ("arising under"), the Court concluded the test for subject-matter jurisdiction should be the same. Because Manning had pleaded a claim arising under state law, and not one "arising under" the Exchange Act, the Court held that remand to state court was proper. The Court noted that the wording in § 27 of the Exchange Act was used in several New-Deal-era federal regulatory statutes (*i.e.*, the Federal Power Act of 1935, Connally Hot Oil Act of 1935, Natural Gas Act of 1938, Trust Indenture Act of 1940, and International Wheat Agreement Act of 1949) and at least later one (*i.e.*, Interstate Land Sales Full Disclosure Act of 1968). It appears likely that all of those statutes will now be governed by the § 1331 "arising under" test.

Section C. Diversity and Alienage Jurisdiction

2. Citizenship of Corporations

Add the following citation at page 276 at the end of Note 1 in the *Notes and Questions on Additional Diversity Jurisdiction Issues*:

Americold Realty Trust v. Conagra Foods, Inc., 577 U.S. ___, 136 S. Ct. 1012 (2016) (real estate investment trust is a citizen of every state where its shareholders are citizens).

* * * * *

Chapter 5

Sources of Law

Section C. The Evolution of the *Erie* Branches and the Search for Standards

Insert at page 365 at the end of Note 2 in the *Notes and Questions*:

Subsequently, in *Atlantic Marine Construction Co. v. United States District Court*, 571 U.S. __, 134 S. Ct. 568 (2013), the Supreme Court held that whether venue is "wrong" or "improper" depends *exclusively* on whether court in which case was brought satisfies requirements of federal venue laws, irrespective of any forum-selection clause that may apply in case. Consequently, the Court held that a forums-selection clause pointing to a particular federal district may be properly enforced through a motion to transfer under §1404(a), and not through a motion to dismiss for improper venue under Rule 12(b)(3) and §1406(a). The Court held that when the parties have agreed to a valid forum-selection clause, that clause should be given controlling weight in all but the most exceptional cases, and the district court should ordinarily transfer the case to the forum specified in clause. The Court also indicated that the appropriate mechanism to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens.

The Court further held that when a case is transferred under §1404(a) in enforcement of a forum-selection clause, the normal rule of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), directing that the transferee court apply the choice-of-law rules of the transferring court, does not apply. *Van Dusen* is discussed at pages 348-49 of the casebook.

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Chapter 6

Pleading and Related Matters

Section B. Stating a "Claim for Relief" in the Complaint and Pleading Special Matters

Insert at page 445 at the end of Note 2 in the *Notes and Questions*:

There is continuing evidence to suggest that the lower courts are having difficulty applying the *Twombly/Iqbal* (or "*Twiqbal*") "plausibility" standard consistently. *Compare, e.g.*, *McCleary-Evans v. Maryland Dep't of Transp.*, 780 F.3d 582 (4th Cir. 2015) (upholding the federal district court's dismissal of a complaint alleging the plaintiff had not been hired because the defendant discriminatorily gave a preference to white male candidates over Black female candidates; the complaint did not allege any qualification differences, but it instead simply asserted that the employer had reached its decisions "for reasons of race and gender"; "[w]hile the allegation that non-Black decisonmakers hired non-Black applications instead of the plaintiff is *consistent* with discrimination, it does not alone support a *reasonable inference* that the decisionmakers were motivated by bias"), *with Samovsky v. Nordstrom, Inc.,* 619 Fed. Appx. 547, 2015 WL 6522850 (7th Cir. 2015) (vacating the federal district court's dismissal of a poorly written complaint which the district court had viewed as based on "pure speculation and conjecture"; the Seventh Circuit stated, "'I was turned down for a job because of my race' is all a complaint has to say"; "[t]hough buried under a mound of superfluous, repetitious, and irrelevant assertions, [the plaintiff's] allegations do say at least this much").

Insert at page 445 at the end of Note 3 in the *Notes and Questions*:

One of the proposals included in the December 1, 2015 rule amendments was a proposal to abrogate Rule 84 and the corresponding Appendix of Forms. Although the issue was controversial, the Advisory Committee on Civil Rules recommended and the Standing Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court approved the proposed abrogation of Rule 84 and the Appendix of Forms. The abrogation of Rule 84 and the Appendix of Forms became effective December 1, 2015.

The forms were initially adopted in 1938 and, as stated in Rule 84, were designed to "illustrate the simplicity and brevity" that the rules contemplate. The Advisory Committee noted that the forms had served this initial purpose well, but would be excessively time-consuming to update to cover the breadth of today's modern practice. The Advisory Committee also noted that "[a] secondary consideration has been the tension that may be found between the forms and modern pleadings standards." This "tension," of course, is the point addressed in Note 3 of the Casebook. The Advisory Committee further explained:

Functioning as simple pictures, [the forms] played [their] role well. The original

> concept of notice pleading came to be well understood, but developments in motions to dismiss under Rule 12(b)(6), Rule 11 requirements, modern statutory causes of action and pleadings requirements, Supreme Court decisions on the requirements of Rule 8, and a general increase in the complexity of litigation now lead most lawyers to plead far more than the minimum thresholds illustrated by the forms. There is serious ground to wonder whether the pleading forms could be revised in a way that would assist lawyers in pleading modern causes of action.

The Advisory Committee also recognized that in litigation practice today there are "many excellent alternative sources for forms, including the Administrative Office of the United States Courts." One immediate impact of the abrogation is that more detailed pleadings will be required in patent cases than was required by Federal Form 18 in order to meet the plausibility standard.

Insert at page 447 at the end of the *Notes and Questions*:

9. In *Johnson v. City of Shelby,* 574 U.S. __, 135 S. Ct. 346 (2014), the Supreme Court continued to try to clarify its plausibility rulings in *Twombly* and *Iqbal*. In *Johnson*, several police officers, including Johnson, worked for the City of Shelby until they were fired by the city's board of aldermen. The officers asserted that they had been fired because they had brought to light criminal activities of one of the aldermen. In their lawsuit, the officers claimed their dismissal violated their Fourteenth Amendment Due Process rights. However, their complaint did not reference § 1983 of the Civil Rights Act. The district court entered summary judgment against the officers because they failed to specifically invoke § 1983. The Fifth Circuit Court of Appeals affirmed.

In a per curiam opinion, the Supreme Court reversed and remanded the case. The Court stated that its decisions in *Twombly* and *Iqbal* "are not on point, for they concern the factual allegations a complaint must contain to survive a motion to dismiss." In effect, the Court held that a plaintiff must set forth enough facts to state a plausible claim entitling the plaintiff to relief under at least one theory. After that, the plaintiff can then recover under any legal theory supported by those facts. In so holding, the Court favorably quoted Wright and Miller's treatise for the proposition that "[t]he federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief."

Section C. Responding to the Complaint

1. Preanswer Motions

Insert the following new note in the *Notes and Questions* at page 455:

4. Under Rule 12(b), a motion to *dismiss* can be made on a variety of grounds. However, even if the basis for the motion is valid, the action might not be "dismissed." For example, a motion to dismiss for improper venue might result in a transfer under 28 U.S.C. § 1406 when venue is improper "if it be in the interest of justice." In addition, 28 U.S.C. § 1631 provides that

if a court "finds a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed . . . ." This provision has been widely used when defects in subject-matter jurisdiction are found. In addition, in *Federal Home Loan Bank v. Moody's Corp.*, 821 F.3d 102 (1st Cir. 2016), the First Circuit interpreted this provision to also apply to personal jurisdiction based on a "plain meaning" analysis. The court saw no ambiguity in the statutory language and quoted the definition of "want of jurisdiction" in *Black's Law Dictionary* indicating that "want of jurisdiction" included both personal and subject-matter jurisdiction. Several other circuits have reached the same conclusion.

Section E. Amendments

3. Relation Back of Amendments: Rule 15(c)

(c) Amendments Changing the Party Under Rule 15(c)(1)(C)

Insert at page 470 at the end of the second paragraph:

Under the 2015 amendments to the Federal Rule 4(m), the time within which a defendant must be served following the filing of the complaint has been shortened to 90 days. Because Rule 15(c)(1)(C) cross-references Rule 4(m), this change also affects the timing of the notice requirement for "relation back" amendments changing the party.

* * * * *

Chapter 7

Joinder of Claims and Parties

Section J. Class Actions

Insert at page 546, after immediately after the discussion of *Standard Fire Insurance Co. v. Knowles* case:

In *Mississippi ex rel. Hood v. AU Optronics*, 571 U.S. __, 134 S. Ct. 736 (2014), the Supreme Court interpreted the term "mass action" not to include actions brought by a state on behalf of its general populace for purposes of removal from state court to federal court under CAFA.

* * * * *

Chapter 8

Discovery

Section A. Basic Discovery Scope and Methods

1. The General Scope of Discovery: Rule 26(b)(1)

Insert at page 554, after the fifth paragraph:

The most significant (and most heavily debated) amendment to the discovery rules as part of the December 1, 2015 amendments was the revision of Rule 26(b)(1) on the scope of discovery. Rule 26(b)(1) has been amended in four ways:

1. To emphasize the importance of defining and limiting the scope of discovery to what is proportional to the needs of a particular case, the proportionality cost-benefit factors presently set forth in current Rule 26(b)(2)(C)(iii) are transferred to Rule 26(b)(1) and are now expressly incorporated in defining the scope of discovery.

2. The current listed examples in Rule 26(b)(1) authorizing discovery of the existence of documents or tangible things and the identity of persons who have knowledge of discoverable matter are eliminated in the revised rule as unnecessary, excess language in defining the scope of discovery.

3. The dual-standard scope of discovery first introduced in the December 1, 2000 amendments to Rule 26(b)(1) between discovery of matter relevant to the parties' claims or defenses and discovery of matter relevant to the subject matter of the action on showing good cause is eliminated. Under the revised Rule 26(b)(1), only the first standard remains—matter relevant to the parties' claims or defenses. The Advisory Committee noted that the latter provision for matter relevant to the subject matter of the action was "rarely invoked" and that given a proper understanding of what is relevant to a claim or defense, as broadly defined in the 2000 Advisory Committee Note (reprinted at page 554 of the Casebook), "proportional discovery relevant to any party's claim or defense suffices."

4. Finally, the provision allowing discovery of inadmissible information "reasonably calculated to lead to the discovery of admissible evidence" is rewritten to now state that "Information within this scope of discovery need not be admissible in evidence to be discoverable." This revision was prompted by the concern that some courts have improperly used the former "reasonably calculated to lead" language to improperly expand the scope of discovery beyond the permitted limits.

Amended Rule 26(b)(1) and (2)(C) provides as follows:

Rule 26. Duty to Disclose; General Provisions; Governing Discovery

* * *

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) Limitations on Frequency and Extent.

* * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(~~1~~) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

2. Limitations on Discovery Under Rule 26

Insert at page 558 at the end of "Protective and Other Orders Limiting Discovery":

Another of the amendments to the discovery rules that was part of the proposed December 1, 2015 rule amendments was an amendment to Rule 26(c) governing protective orders. This amendment expressly provided that the court may consider cost-shifting in entering a discovery protective order.

Rule 26(c)(1) now authorizes the court to enter an order to protect against "undue burden or expense." The Advisory Committee noted that this authority includes authority to allow discovery

only on condition that the requesting party bear part or all of the costs of responding. The Advisory Committee believed it was useful, however, to make the authority explicit to ensure that courts and the parties will consider this choice as an alternative to either denying requested discovery or ordering it despite the risk of imposing undue burdens and expense on the party who responds to the request.

The Advisory Committee cautioned that this explicit inclusion of the court's cost-shifting authority in the text of Rule 26(c) "does not mean that cost-shifting should become a common practice. The assumption remains that the responding party ordinarily bears the costs of responding."

Amended Rule 26(c) provides as follows:

> **(c) Protective Orders.**
> (1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *
>
> (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

Insert at page 593 in the *Notes and Questions*:

3. The consequences of failing to produce relevant information during discovery can be significant. For example, in *Haeger v. Goodyear Tire & Rubber Co.*, 793 F.3d 1122 (9th Cir. 2015), the Ninth Circuit upheld the district court's award of sanctions constituting all of the consumer-plaintiff's attorney's fees and costs in the action, which totaled more than $2.7 million. The sanctions were based on Goodyear's "bad faith" failure to produce testing information performed by Goodyear on a particular model of tire involved in the litigation. The fact that testing had been conducted only came to light in a subsequent reported case where responsive testing documents had been produced.

The motion for sanctions came more than a year after the *Haeger* case had settled, which occurred on the first day of trial. The court relied on the court's inherent authority to sanction upheld in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). The sanctions were allocated both Goodyear and its lawyers. The court emphasized that the situation was made much worse by repeated misrepresentations, including assertions to the trial judge.

In the *Haeger* case, Goodyear argued that it had objected to the plaintiff's requests and then proceeded to produce a few responsive documents. The 2015 amendment to Federal Rule 34(b)(2) is specifically intended to put additional pressure on parties like Goodyear by requiring that objecting parties identify what documents are *not* being produced.

Section B. Special Considerations in the Discovery of Electronically Stored Information ("E-Discovery")

Insert at page 595 as the top paragraph:

Another of the amendments to the discovery rules adopted as part of the proposed December 1, 2015 rule amendments was an amendment to Rule 37(e) on e-discovery sanctions. The amended rule was designed to clarify the standards for the imposition of sanctions and to make clear that sanctions are only appropriate for e-discovery that is lost in situations in which there was a litigation duty to preserve the e-discovery and the party failed to take reasonable steps to preserve it.

As noted by the Advisory Committee, the amendment to Rule 37(e) was necessary because the federal circuits have established "significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough."

The proposed amendment and revisions to Rule 37(e) are:

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * *

(e) Failure to Preserve ~~Provide~~ Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~ If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

* * * * *

Chapter 9

Disposition of the Action Without Trial

Section C. Summary Judgment

Insert new Note 8 at the bottom of page 647:

8. In *Tolan v. Cotton*, 572 U.S. __, 134 S. Ct. 1861 (2014) (per curiam), the Supreme Court warned that courts must view the evidence at summary judgment in the light most favorable to the nonmoving party and must avoid (significant) weighing of the evidence to resolve disputed factual issues. In this case, Robert Tolan had commenced a § 1983 action against a police officer. Tolan alleged that the officer used excessive force in violation of the Fourth Amendment. The district court entered summary judgment for the officer and the First Circuit Court of Appeals affirmed. The Supreme Court reversed. In this regard, the Court stated as follows:

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.
>
> Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. . . . We . . . vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, [the officer's] actions violated clearly established law.

Id. at __, 134 S. Ct. at 1868.

Section E. Devices to Encourage Settlement

Insert new text at the end of the section at page 661:

Effect a Refusal to Accept a Rule 68 Offer on Subject-Matter Jurisdiction. In *Campbell-Ewald v. Gomez*, 577 U.S. __, 133 S. Ct. 663 (2016), the plaintiff, on behalf of the plaintiff and a putative class, asserted that the defendant had violated the Telephone Consumer

Protection Act, 47 U.S.C. § 227, when the defendant sent the plaintiff and others unsolicited advertisements via text message. Before the class was certified, the defendant made an offer of settlement to the plaintiff pursuant to Federal Rule 68. That offer fully covered all of the plaintiff's available damages and also proposed injunction against future violations of the Act. Not surprisingly, the plaintiff did not to accept the offer. The defendant then moved to dismiss the case for lack of subject-matter jurisdiction on the ground that the plaintiff's claim was mooted by offering to pay the plaintiff all the damages to which the plaintiff was entitled. The Court refused to accept the defendant's argument. The Court stated the "[l]ike other unaccepted contract offers, [an unaccepted settlement offer] creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists." In his dissent, Chief Justice Roberts noted that the Court did not answer the question of whether actual payment of complete relief would lead to the same result.

* * * * *

Chapter 10

Trial

Section A. Selecting the Trier of Fact

4. Selection of Jurors: Rule 47

(b) Constitutional Limits on Peremptory Challenges

Insert the following text at the beginning of Note 1 in the *Notes and Questions* at page 693:

The basic principle of *Batson* in criminal cases was again reaffirmed and applied by the Supreme Court in *Foster v. Chatman*, 577 U.S. __, 136 S. Ct. 1737 (2016) ("the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury").

* * * * *

Chapter 11

Post-Trial Motions, Appellate Review, and Extraordinary Relief from Judgments

Section A. Post-Trial Motions

2. Motions for a New Trial

Insert the following text at the end of the section at page 711:

New Trial vs. Recall of the Jury After Discharge. In *Dietz v. Bouldin*, 577 U.S. ___, 136 S. Ct. 1885 (2016), the Supreme Court addressed the question of whether a federal district judge has the power to recall a discharged jury after the jury had delivered a legally unacceptable verdict—as opposed to ordering a new trial. In *Dietz*, the defendant had stipulated to both its liability and that the plaintiff was entitled to approximately $10,000 in damages for medical expenses already incurred. The only issue at trial was whether the plaintiff was entitled to more than that amount to cover future medical expenses arising from the injuries suffered in an auto accident. After deliberating, the jury rendered a verdict in the amount of zero dollars for the plaintiff, and the judge discharged the jury. A few minutes later, after recognizing that the jury's verdict was a mistake by not awarding at least $10,000, the judge ordered the clerk to find the jurors and reassemble them. The trial judge then instructed the jurors to deliberate again and not to return a verdict for less than $10,000. The jury then rendered a $15,000 verdict.

In this unusual situation, the Supreme Court recognized that a judge had the inherent power to recall a discharged jury. However, the Court emphasized a trial judge should rarely exercise this power and must consider the "potential for taint." The factors that the trial judge should consider include the following: (1) the length of time between discharge and recall of the jury; (2) whether the jurors had the opportunity to speak to anyone; and (3) whether the reaction to the verdict's announcement might have caused jurors to have second thoughts. Otherwise, the appropriate corrective action would be for the judge to order a new trial.

* * * * *

Chapter 12

Finality in Litigation

Section B. Claim Preclusion

2. Applying the Requirements of Claim Preclusion

Insert after the *Notes and Questions* on page 737 the following text:

The U.S. Supreme Court had to address claim preclusion issues in its recent decision involving Texas statutes and their implementing rules requiring (1) abortion providers have "admitting privileges" at local hospital located no more than 30 miles from their abortion facility and (2) abortion facilities meet minimum standards for "ambulatory surgical centers." Before the law took effect, a group of Texas abortion providers brought a federal court action challenging the constitutionality of the admitting-privileges provision on the ground that no application of the statute would be constitutional (a "facial challenge"). Those providers lost that action, and the decision was affirmed by the Fifth Circuit. The plaintiffs did not seek review of the decision in the U.S. Supreme Court.

After the provisions took effect, various abortion providers (including some who had lost the prior action), acting on behalf of themselves and their patients, sought declaratory and injunctive relief from the ambulatory-surgical-center-standards provision on a state-wide basis and from the admitting-privileges provision in two cities, McAllen and El Paso, Texas. The plaintiffs argued that the provisions, "as applied," were unconstitutional. (An "as applied" challenge asserts that a provision operates unconstitutionally as to them because of their particular circumstances.) This time the case reached the U.S. Supreme Court. In *Whole Women's Health v. Hellerstedt*, 579 U.S. __, 136 S. Ct. 2292 (2016), the Court struck down both provisions on the ground that they placed an "undue burden" on access to an abortion.

Before reaching the merits, the Court had to deal with a claim preclusion defense. The defendants argued that because many of the same abortion providers had brought a state-wide facial challenge to the admitting-privilege requirement and had lost, that issue could not be relitigated again. In response, the Court stated that

> [t]he doctrine of claim preclusion (the here-relevant aspect of res judicata) prohibits "successive litigation of the very same claim" by the same parties. . . . Petitioners' postenforcement as-applied challenge is not "the very same claim" as their preenforcement facial challenge. The Restatement of Judgments notes that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim. *See* Restatement (Second) of Judgments § 24, cmt. f (1980) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which

> may be made the basis of a second action not precluded by the first") . . . . The Restatement adds that, where "important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." § 24, cmt. f. . . .
>
> . . . .
>
> . . . . Here, petitioners bring an as-applied challenge to the requirement after its enforcement—and after a large number of clinics have in fact closed. The postenforcement consequences of [this provision of the Texas statute] were unknowable before it went into effect.

The defendants also asserted a claim preclusion challenge to the ambulatory-surgical-center-standards requirement. This challenge was based on its omission from the prior suit. In this regard, the Fifth Circuit had found that "[t]he challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same [A]ct; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts." 790 F.3d at 581. The U.S. Supreme Court disagreed. The Court found that

> [t]he Court of Appeals failed . . . to take account of meaningful differences. The surgical-center provision and the admitting-privileges provision are separate, distinct provisions . . . . They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as "separate claims," even when they are part of one overarching "[g]overnment regulatory scheme." . . .
>
> . . . . The opposite approach adopted by the Court of Appeals would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion. Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.
>
> [In addition,] the statute gave the Texas Department of State Health Services authority to make rules implementing the surgical-center requirement. . . . At the time petitioners filed [their first suit], that state agency had not yet issued any such rules. . . .
>
> Further, petitioners might well have expected that those rules when issued would contain provisions grandfathering some then-existing abortion facilities and granting full or partial waivers to others. After all, more than three quarters of non-abortion-related surgical centers had benefited from that kind of

> provision. . . .
>
> Finally, the relevant factual circumstances changed between [the first suit] and the present lawsuit, as we previously described. . . .
>
> The dissent musters only one counterargument. According to the dissent, if statutory provisions "impos[e] the same kind of burden . . . on the same kind of right" and have mutually reinforcing effects, "it is evident that" they are "part of the same transaction" and must be challenged together. . . . But for the word "evident," the dissent points to no support for this conclusion, and we find it unconvincing. Statutes are often voluminous, with many related, yet distinct, provisions. Plaintiffs, in order to preserve their claims, need not challenge each such provision of, say, the USA PATRIOT Act, the Bipartisan Campaign Reform Act of 2002, the National Labor Relations Act, the Clean Water Act, the Antiterrorism and Effective Death Penalty Act of 1996, or the Patient Protection and Affordable Care Act in their first lawsuit.

Insert new Note 4 in the *Notes and Questions* at page 778:

4. In *V.L. v. E.L.*, 577 U.S. __, 136 S. Ct. 1017 (2016), a Georgia state court entered a final decree of adoption, which recognized V.L. and E.L., two women, as the "legal parents" of the three children born to the couple through assisted reproductive technology. The women ended their relationship in 2011 while living in Alabama. One of the women moved out of the home, taking the children with her and denying visiting rights to the other. An action was commenced in an Alabama state court to establish visitation rights, relying on the Georgia adoption decree. The Alabama Supreme Court held that the Georgia court lacked subject-matter jurisdiction under Georgia law to enter its decree and refused to give full faith and credit to the decree.

Reversing, the U.S. Supreme Court emphasized that when "a judgment indicates on its face that it was rendered by a court of competent jurisdiction, such jurisdiction is to be presumed unless disproved. . . . The Georgia judgment appears on its face to have been issued by a court with jurisdiction, and there is no established Georgia law to the contrary." The Court also noted that "[a] State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits."

* * * * *